

PART I – INTRODUCTION

I-A. Introductory comments

[1] These submissions are made in respect of the exposure draft of the Public Interest Disclosure and Other Legislation Amendment (Whistleblower Protections) Bill 2025 (**Bill**).¹ Specifically, I shall address, and only address, Schedule 1, Part 1 of the Bill in these submissions.

[2] These submissions, broadly, focus on two themes.

[3] The first is about the failure of the drafters of the Bill to heed concerns, identified in paragraphs 1.74 – 1.76 of the Legal and Constitutional Affairs Committee's report into the Whistleblower Protection Authority Bill 2025,² about the immunities from liability of officials in the proposed Whistleblower Protection Authority.

[4] Those concerns are not without justification.

[5] The second, which relates to the first, is about adequate oversight of the operations of the Office of the Commonwealth Ombudsman in respect of the Ombudsman's (and the potential Whistleblower Ombudsman's) exercise of powers and functions. The Bill does not address the fact that the Commonwealth Ombudsman's operations are virtually inscrutable in respect of the Ombudsman's dealings with whistleblowers.

[6] The essential point of the second theme is that it is not enough to simply empower an agency to take certain kinds of actions without providing adequate mechanisms to determine whether those powers are being exercised as the Parliament intends. One would think that, in the light of the Hon Catherine Holmes' criticisms, in the *Report of the Royal Commission into the Robodebt Scheme*,³ of the Ombudsman's failures to exercise powers as intended by the Parliament that the drafters of the Bill would have turned their minds to this issue of proper oversight.

[7] While the proposals set out in the Bill are welcome, they fail to address the two systemic problems identified as relevant themes above.

I-B. Summary of layout and content of submissions

[8] In part II of these submissions, I shall address and assess the drafter's failures to deal with the immunities from liability of officials in the proposed Bill. In the light of that assessment, I shall submit a very modest proposal for an amendment to the *Ombudsman Act 1976* (Cth).

[9] In part III of these submissions, I shall address and assess the drafter's failures to deal with issues of oversight of the operations of the Office of the Commonwealth Ombudsman in respect of the Ombudsman's (and the potential Whistleblower Ombudsman's) exercise of powers and functions. In the light of that assessment, I shall propose relatively modest statutory interventions that, in my view, mollify the effects of the unsatisfactory state of affairs that exists in respect of the

1 The bill is accessible here:

https://consultations.ag.gov.au/integrity/public_sector_whistleblower_reforms/user_uploads/exposure_draft_bill-public_sector_whistleblower_reform.pdf

2 The Legal and Constitutional Affairs Committee's report into the Whistleblower Protection Authority Bill 2025 (No 2) is accessible here:

https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000652/toc_pdf/WhistleblowerProtectionAuthorityBill2025.pdf

3 The Hon Catherine Holmes AC SC, *Report of the Royal Commission into the Robodebt Scheme* (2023), chapter 21 <<https://robodebt.royalcommission.gov.au/publications/report>>.

Commonwealth Ombudsman's administration of the *Public Interest Disclosure Act 2013* (Cth) regime.

PART II – IMMUNITIES FROM LIABILITY

II-A. Immunities from liability under the Whistleblower Protection Authority Bill 2025 (No 2)

[10] Clause 64 of the Whistleblower Protection Authority Bill 2025 (No 2) was worded as follows:⁴

64 Immunity from civil proceedings for staff members of the Authority and persons assisting

(1) A staff member of the Authority is not liable to civil proceedings in relation to an act done, or omitted to be done, in good faith, in the performance or purported performance, or exercise or purported exercise, of the staff member's functions, powers or duties under, or in relation to, this Act.

(2) A person whom the Commissioner requests, in writing, to assist a staff member of the Authority is not liable to civil proceedings in relation to an act done, or omitted to be done, in good faith for the purpose of assisting the staff member.

II-B. Concerns about immunities from liability under the Whistleblower Protection Authority Bill 2025 (No 2)

[11] As the Senate's Legal and Constitutional Affairs Committee noted in its report on the Whistleblower Protection Authority Bill 2025 (No 2), clause 64 of the Whistleblower Protection Authority Bill 2025 (No 2) posed concerns for the Senate's Standing Committee for the Scrutiny of Bills. Specifically, in Scrutiny Digest 3 of 2025, the Senate's Standing Committee for the Scrutiny of Bills raised "scrutiny concerns under ... clause 64 in relation to immunity from liability."⁵

[12] The Senate's Legal and Constitutional Affairs Committee also noted, in its report on the Whistleblower Protection Authority Bill 2025 (No 2), that the Whistleblower Protection Authority Bill 2025 (No 2) "appears to engage and may limit human rights."⁶

II-C. The actual state of immunities possessed by the Commonwealth Ombudsman and his officials in respect of consideration of complaints about inadequate whistleblower disclosure investigations

[13] Legitimate concerns were raised about the immunities that were to be granted to the Whistleblower Protection Commissioner and those supporting that Commissioner.

[14] Ironically, those very immunities, which were the subject of concern for both the Senate's Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights, have been granted to the Commonwealth Ombudsman, and the officials who support him, by the Commonwealth Parliament. Specifically, section 33 of the *Ombudsman Act 1976* (Cth) provides:

4 The Whistleblower Protection Authority Bill 2025 (No 2) is accessible here:

https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbills%2F7301_first-reps%2F0000%22;rec=0

5 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No 3 of 2025* (27 March 2025), page 9.

The digest is accessible here:

https://www.aph.gov.au/-/media/Committees/scrbc/ctte/reports/2025/Scrutiny_Digest_3_of_2025/report/Scrutiny_Digest_3_of_2025.pdf

6 Senate Legal and Constitutional Affairs Committee, *Report into Whistleblower Protection Authority Bill 2025* (29 August 2025), page 17.

33 Ombudsman not to be sued

(1) Subject to section 35, neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done in good faith in exercise or purported exercise of any power or authority conferred by this Act or Division 7 of Part V of the Australian Federal Police Act 1979.

(2) A reference in this section to the Ombudsman includes a reference to a Deputy Ombudsman or a delegate of the Ombudsman.

[15] Clause 64 of the Whistleblower Protection Authority Bill 2025 (No 2), which is in substantially identical language to section 33 of the *Ombudsman Act 1976* (Cth), warranted concern for the Legal and Constitutional Affairs Committee, Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights, yet nowhere in the Public Interest Disclosure and Other Legislation Amendment (Whistleblower Protections) Bill 2025 are the immunities in section 33 the *Ombudsman Act 1976* (Cth) addressed.

II-D. What section 33 of the *Ombudsman Act 1976* (Cth) entails

II-D1. Judicial review for acts done, or omissions made, that are not in good faith

[16] In essence, section 33 of the *Ombudsman Act 1976* (Cth) limits the liability of the Commonwealth Ombudsman, or people acting under his direction or authority, to acts done or omitted to be done in good faith.⁷

[17] I note that it is no purpose of these submissions to educate the Committee on the mechanisms, history or development of the law of judicial review, both at common law and under statute, in Australia.

[18] I take for granted that the reader of these submissions is aware that:

a) since the passage of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), a statutory scheme for judicial review has existed in respect of the decisions of the Commonwealth's administrative decision makers;⁸ and

b) applications for judicial review of acts not done, or omissions not made, in good faith by officials of the Commonwealth may be submitted to courts of competent jurisdiction under the ADJR Act.⁹

[19] Strictly speaking, the ADJR Act provides that an improper exercise of power extends to an

⁷ Separately, there are the entrenched rights of review, set out in section 75 of the *Constitution*, for jurisdictional error. Jurisdictional error is the only other ground of judicial review.

⁸ Aside from the outstanding academic works on judicial review in Australia, which are too many to even consider mentioning, I commend the following reports to the Committee:

a) *Commonwealth Administrative Review Committee Report 1971*, Parliamentary Paper No 144 of 1971; and

b) *Prerogative writ Procedures: Report of Committee of Review*, Parliamentary Paper No 56 of 1973.

The interim and final reports of the *Bland Committee* are also recommended.

⁹ e.g. *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(1)(e) and 5(2)(d).

exercise of a discretionary power in *bad faith*.¹⁰ It does not follow that an act not done, or an omission not made, in good faith is *necessarily* an exercise of power in *bad faith*.

[20] That said, the Full Court of the Federal Court of Australia took for granted that liability, under section 33 of the *Ombudsman Act 1976* (Cth),¹¹ for “an act done or omitted to be done in good faith” is to be understood as liability for an act done, or omitted to be done, in *bad faith*.¹² In the light of the canons of statutory interpretation and the judgment of the Full Court of the Federal Court of Australia, the sense in which liability is to be ascribed for “an act done, or omitted to be done, in good faith” in the Bill is synonymous with bad faith for the purposes of the ADJR Act.

II-D2. What are acts done, or omissions made, in bad faith

[21] Under Australian law, allegations of bad faith are not to be lightly made.¹³

[22] Allegations of bad faith must be clearly alleged and proved.¹⁴

[23] Bad faith cannot be constituted by recklessness in the sense of negligence, no matter how gross the negligence. A decision maker cannot blunder into bad faith, no matter how stupid and careless the tribunal member is, any more than a person can blunder into deceit or wilful blindness.¹⁵

[24] Illogical factual findings or procedural blunders along the way will usually not be sufficient to base a finding of bad faith.¹⁶

[25] Bad faith is not just a matter of poor execution or poor decision-making involving error. It is a lack of an honest or genuine attempt to undertake the task in a way meriting personal criticism of the tribunal or officer in question.¹⁷

[26] Bad faith is a serious matter involving *personal fault* on the part of the decision-maker going beyond the errors of fact or law which are inevitable in any such process.¹⁸ There is no such thing as deemed or constructive bad faith.¹⁹

[27] Cases in which bad faith is established will be rare and extreme.²⁰

II-D3. The Bill fails to address the concerns of three parliamentary committees about limiting the access of whistleblowers to the judiciary

II-D3.1. Introduction

¹⁰ *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(2)(d).

¹¹ *Ombudsman Act 1976* (Cth), s 33. The provision provides that “neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done *in good faith* in exercise or purported exercise of any power or authority conferred by this Act ...”

¹² *Paschke v Secretary, Department of Social Services* [2023] FCAFC 143, [22]. For a clear and concise statement on the senses in which the expressions “good faith” and “bad faith” are deployed in the law, please refer to the *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32, [11] – [13].

¹³ *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361, [43].

¹⁴ *Ibid.* Also refer to *SZQBN v Minister for Immigration and Citizenship* (2013) 213 FCR 297, [63], where the Full Court of the Federal Court that allegations of bad faith must be pleaded specifically and with particularity.

¹⁵ *NAKF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 210, [24].

¹⁶ *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, [8].

¹⁷ *NAAG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 713, [24]

¹⁸ *SBAP v Refugee Review Tribunal* [2002] FCA 590, [49].

¹⁹ *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, [8].

²⁰ *Haritopoulos Pty Ltd v Deputy Commissioner of Taxation* [2007] FCA 394, [32].

[28] Under the Bill, whistleblowers are still restricted to sustaining actions against officials in the Office of the Commonwealth Ombudsman to the ground of bad faith under the *Ombudsman Act 1976* (Cth).²¹ That is irrespective of the functions that the proposed Whistleblower Ombudsman will exercise.

[29] In other words, whether the function is that of:

- a) the very rare circumstance where officials in the Office of the Commonwealth Ombudsman investigate whistleblower disclosures made under the *Public Interest Disclosure Act 2013* (Cth);²² or
- b) the relatively more common circumstance where officials in the Office of the Commonwealth Ombudsman investigate complaints about the adequacy of investigations, conducted by officials in agencies to which disclosures have been made or allocated, of whistleblower disclosures made under the *Public Interest Disclosure Act 2013* (Cth),

whistleblowers are restricted to sustaining actions at law, against officials in the Office of the Commonwealth Ombudsman, to the ground of bad faith.

[30] Limiting a whistleblower's access to the judiciary on the limited ground of bad faith is regrettable because cases in which bad faith will be established are rare and extreme.

[31] More often than not, decisions detrimentally affecting a whistleblower will be based on errors of law.

[32] In the context of the Bill, there is nothing in the Bill, or the overview of the Bill,²³ that sheds any light on why the drafters of the Bill have failed to take seriously the concerns of three parliamentary committees on the issue of providing blanket immunities to the authority responsible for dealing with complaints about inadequate investigations in respect of whistleblower disclosures made under the *Public Interest Disclosure Act 2013* (Cth).

[33] Despite the concerns of those parliamentary committees, the drafters of the Bill appear to have dismissed those concerns as unwarranted, and appear content to deny whistleblowers access to the judiciary to remedy errors in respect of unlawful administrative decisions.

[34] Why whistleblowers should be denied access to the judiciary to remedy errors of law made by the Commonwealth Ombudsman, the proposed Whistleblower Ombudsman, or those acting under the authority or direction of the Commonwealth Ombudsman is not clear.

II-D3.2. An assessment of the justification for limiting the access of a whistleblower to the judiciary to decisions made in bad faith

[35] In the ordinary course, errors of law would be capable of remedy because a person aggrieved by an unlawful decision would be entitled to bring an action, in the Federal Court of Australia or Division 2 of the Federal Circuit and Family Court of Australia, for judicial review on account of an

²¹ *Ombudsman Act 1976* (Cth), s 33.

²² See, for example, Agency Guide to the *Public Interest Disclosure Act 2013* (Cth), Version 3, paragraph 2.6.2.

The Agency Guide to the *Public Interest Disclosure Act 2013* (Cth), Version 3, is accessible here:
<https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing/tools-and-resources>

²³ The overview of the Bill is accessible here:
https://consultations.ag.gov.au/integrity/public_sector_whistleblower_reforms/user_uploads/explanatory_material-public_sector_whistleblower_consultation.pdf

error of law.²⁴

[36] Unfortunately, whistleblowers are denied this general statutory right to sustain an application for judicial review in respect of legally erroneous decisions made by officials in the Office of the Commonwealth Ombudsman because neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done in good faith in exercise or purported exercise of any power or authority conferred by the *Ombudsman Act 1976* (Cth).²⁵

[37] That is because, as the lamented Gyles J so deftly put it, a decision-maker cannot blunder into bad faith, no matter how stupid or careless the person is, any more than a person can blunder into deceit or wilful blindness.²⁶ Bad faith is not just a matter of poor execution or poor decision-making involving error. It is a lack of an honest or genuine attempt to undertake the task in a way meriting personal criticism of the tribunal or officer in question.²⁷

[38] In other words, no matter how stupid or careless the person is who makes the error, it will not constitute bad faith without a demonstration that the relevant official's actions or omissions lacked an honest or genuine attempt to undertake the task in a way meriting personal criticism. This is all but impossible.²⁸

[39] But why should a whistleblower's right to remedy an error made by the Commonwealth Ombudsman, the proposed Whistleblower Ombudsman, or persons acting under the authority or direction of the Commonwealth Ombudsman, be premised on the *intentions* of a decision-maker?

[40] It makes no difference to the *consequences* of an error whether or not a decision-maker has made an error in good faith or in bad faith; the error is real and affects the whistleblower.

[41] The focus shifts from:

a) *lawfully dealing with the wrongdoing* underlying the disclosure, which is the primary purpose of whistleblower legislation like the *Public Interest Disclosure Act 2013* (Cth); or

b) *lawfully dealing with the complaint* about an inadequate investigation of a whistleblower disclosure,

to the state of mind of the person dealing with the disclosure of wrongdoing.

[42] The state of mind of a person investigating a disclosure made under the *Public Interest Disclosure Act 2013* (Cth), or a complaint about the inadequate investigation of a whistleblower disclosure made under the *Public Interest Disclosure Act 2013* (Cth), is of no practical relevance to dealing effectively with wrongdoing in the Commonwealth.

[43] It is also worth noting that the inability to effectively sustain proceedings, in the Federal Court of Australia or Division 2 of the Federal Circuit and Family Court of Australia, for judicial review against officials in the Office of the Commonwealth Ombudsman on account of an error of law in respect of decisions relating to public interest disclosures is, aside from being regrettable, incongruous.

24 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(1)(f).

25 *Ombudsman Act 1976* (Cth), s 33(1).

26 *NAKF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 210, [24].

27 *NAAG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 713, [24]

28 *Haritopoulos Pty Ltd v Deputy Commissioner of Taxation* [2007] FCA 394, [32].

[44] Under the *Public Interest Disclosure Act 2013* (Cth), while a decision-maker is not liable to criminal or civil proceedings for or in relation to an act or matter done, or omitted to be done, in good faith,²⁹ a whistleblower's right to apply to a court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in relation to a decision made under the *Public Interest Disclosure Act 2013* (Cth) is unaffected.³⁰

[45] In other words, a person aggrieved by the decision of a decision-maker acting, or purportedly acting, under the *Public Interest Disclosure Act 2013* (Cth) is still entitled to apply for judicial review under the ADJR Act.

[46] Indeed, a whistleblower's right to apply to a court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in relation to a decision made under the *Public Interest Disclosure Act 2013* (Cth), is pointedly addressed in Schedule 2 of the Bill and on page 15 of the overview of the Bill.

[47] Why should a whistleblower not be able to sustain an action for judicial review in respect of errors made by the Commonwealth Ombudsman, the proposed Whistleblower Ombudsman, or officials acting with the authority or under the direction of the Commonwealth Ombudsman, when investigating inadequate public interest disclosures, when whistleblowers have a right to apply for judicial review in respect of the substantively erroneous decisions made by the investigator acting, or purporting to act, under the *Public Interest Disclosure Act 2013* (Cth)?

[48] Obviously, the justification cannot be that the substance of a public interest disclosure should be kept from the judiciary; whistleblowers are able to seek judicial review of the substantive decision made, or purportedly made, under the *Public Interest Disclosure Act 2013* (Cth).

[49] Considering the concerns raised, by three parliamentary committees, about the immunities from suit or action proposed for the Whistleblower Protection Commissioner, or those acting with the authority or under the direction of the Commissioner, it beggars belief that substantively identical immunities have been left intact in respect of the actions or omissions of Commonwealth Ombudsman, the proposed Whistleblower Ombudsman, or those acting with the authority or under the direction of the Commonwealth Ombudsman.

II-E. Proposed legislative amendment to the *Ombudsman Act 1976* (Cth) in respect of immunities

II-E1. Amending section 33 of the *Ombudsman Act 1976* (Cth)

[50] As it stands, subsection 33(1) of the *Ombudsman Act 1976* (Cth) provides that “neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done *in good faith* in exercise or purported exercise of any power or authority conferred by this Act ...”

[51] The *Ombudsman Act 1976* (Cth) ought to be amended so that while the Ombudsman or a member of his staff is not liable to criminal or civil proceedings for or in relation to an act or matter done, or omitted to be done, in good faith, a whistleblower shall have a right to apply to a court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in relation to the Ombudsman's or his delegate's, decision in respect of complaints about inadequately investigated disclosures under the *Public Interest Disclosure Act 2013* (Cth).

29 *Public Interest Disclosure Act 2013* (Cth), s 78(1).

30 *Public Interest Disclosure Act 2013* (Cth), s 78(3).

[52] By way of example, the relevant provision might read something like this:

1) A person who is:

- a) the Commonwealth Ombudsman; or
- b) the Deputy Commonwealth Ombudsman; or
- c) a person acting under the direction or authority of the Commonwealth Ombudsman or the Deputy Commonwealth Ombudsman,

is not liable to any criminal or civil proceedings, or any disciplinary action (including any action that involves imposing any detriment), for or in relation to an act or matter done, or omitted to be done, in good faith:

- d) in the performance, or purported performance, of any function conferred on the person by the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth); or
- e) in the exercise, or purported exercise, of any power conferred on the person by the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth).

2) This section does not apply to a breach of a designated publication restriction under the *Public Interest Disclosure Act 2013* (Cth).

3) This section does not affect any rights conferred by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to apply to a court, or any other rights to seek a review by a court or tribunal, in relation to:

- a) a decision; or
- b) conduct engaged in for the purpose of making a decision; or
- c) a failure to make a decision,

in respect of complaints about inadequately investigated internal disclosures under the *Public Interest Disclosure Act 2013* (Cth), or internal disclosures made to the Commonwealth Ombudsman (or persons in the Commonwealth Ombudsman's office) under the *Public Interest Disclosure Act 2013* (Cth).

(4) An expression used in subsection (3) has the same meaning as in section 10 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

[53] This amendment would ensure that the right of a whistleblower to submit an application for judicial review of a decision, or conduct, or failures of the Ombudsman, or one of his officials, in respect of a complaint about an inadequately handled disclosure investigation under the *Public Interest Disclosure Act 2013* (Cth) broadly mirrors the right of whistleblowers to seek judicial review of decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth).

II-E2. Filing applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)

[54] The filing fees for applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) are set out in the *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth).

[55] Those regulations are made by the Governor-General on the advice of the Federal Executive Council.

[56] The Governor-General would be able to, on the advice of the Federal Executive Council, set the filing fee for an application under the ADJR Act in respect of:

a) decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth); or

b) decisions, or conduct, or failures of the Ombudsman or his officials exercising powers or functions, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in relation to complaints about inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth),

at whatever price the Federal Executive Council deems fit.

[57] The relevant filing fee should mirror the filing fee for applications under section 46PO or 46PP of the *Australian Human Rights Commission Act 1986* (Cth), which is set at \$55.00.³¹

[58] That figure is paltry enough to be met by just about anybody in the country. Naturally, impecunious litigants will be able to avail themselves of the exemption provisions in the *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth) if they are unable to pay the \$55.00 filing fee.³²

II-E3. Shifting the costs burden

[59] In submissions made in response to the Attorney-General's Department's consultation paper, *Public sector whistleblowing reforms: Stage 2 - reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*, Mr Iain Anderson, the Commonwealth Ombudsman made the following submission:³³

The HRLC Report also identified legal costs as a significant deterrent to potential whistleblowers and impost on actual whistleblowers. While increased targeted funding (discussed further below) is one way to address that impact, another way to provide a similar effect is through legislative reform.

A new presumption could be inserted into the PID Act to provide for legal costs to be covered by the Commonwealth unless there are exceptional circumstances. A model for such an approach is set out in s 66 of the *Freedom of Information Act 1982* which provides a tribunal may exercise a discretion to recommend costs be paid by the Commonwealth in

³¹ *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth), Schedule 1, items 102 and 202.

³² *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth), Div 2.3.

³³ Iain Anderson, *Public sector whistleblowing reforms: Stage 2 - reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*, January 2024, page 13, <https://consultations.ag.gov.au/integrity/pswr-stage2/consultation/view_respondent?uuId=923521142> (accessed on 30 June 2025).

certain circumstances.

[60] On principle, I support the Ombudsman's submission to shift the burden for legal costs to the Commonwealth where a whistleblower submits an application under the ADJR Act in respect of:

a) decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth); or

b) decisions, or conduct, or failures of the Ombudsman or his officials exercising powers or functions, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in relation to complaints about inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth).

[61] I submit that both the *Public Interest Disclosure Act 2013* (Cth) and the *Ombudsman Act 1976* (Cth) should be amended so that it is clear that, where the whistleblower applicant **succeeds** on the application, the starting point for the costs order that flows from an application for judicial review is that the whistleblower applicant is to be awarded costs on an **indemnity** basis, subject to respondent having a right to apply to the Court to request a diminution to the indemnity costs on account of the unreasonable conduct of proceedings by the applicant whistleblower (e.g. the applicant spitefully or unnecessarily running up costs, the applicant's conduct causing unnecessary delay to the litigation etc.).

[62] I will not advance submissions in respect of costs burdens where a whistleblower applicant **does not succeed** on an application under the ADJR Act in respect of:

a) decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth); or

b) decisions, or conduct, or failures of the Ombudsman or his officials exercising powers or functions, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in relation to complaints about inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth).

PART III – DEFICIENT INDEPENDENT ADMINISTRATIVE AND PARLIAMENTARY OVERSIGHT

III-A. Introductory comments

[63] Part II of these submissions dealt with the failures, on the parts of the drafters of the Bill, to address the concerning state of affairs denying whistleblowers access to the judiciary for anything other than jurisdictional error or bad faith in respect of decisions made by the Commonwealth Ombudsman, or officials acting under the authority or under the direction of the Commonwealth Ombudsman.

[64] Part III of these submissions will address:

- a) the absence of the salutary and much needed proposal, which was put forward by the drafters of the Whistleblower Protection Authority Bill 2025 (No 2), for parliamentary oversight of the operations of a whistleblower authority (in the case of the Bill, the Office of the Commonwealth Ombudsman (through a Whistleblower Ombudsman)); and
- b) the absence of independent administrative oversight in respect of the operations of a whistleblower authority.

[65] As these submissions unfold, it will become clear that, while the reforms set out in the Bill are welcome, the reforms set out in the Bill do not address the problems that gave rise to the calls for reform and the Whistleblower Protection Authority Bill 2025 (No 2).

III-B. The importance of independent and effective administrative oversight of the operations of the Commonwealth Ombudsman, in respect of his complaints administration functions for the *Public Interest Disclosure Act 2013* (Cth) scheme

III-B1. Introductory comment

[66] The importance of having an independent and effective form of administrative oversight of the operations of the Commonwealth Ombudsman, in respect of the Commonwealth Ombudsman's administration of complaints arising from inadequate or improper disclosure investigations under the *Public Interest Disclosure Act 2013* (Cth), will be made clear in the light of a case study.

III-B2. Complaint to the Commonwealth Ombudsman about an inadequate whistleblower disclosure investigation

III-B2.1. I complained to the Office of the Commonwealth Ombudsman following an inadequate investigation of a whistleblower complaint

[67] I was formerly the head of the Music School at the Australian National University.

[68] I made a whistleblower disclosure under the *Public Interest Disclosure Act 2013* (Cth) about disclosable conduct.

[69] Without going into the details of the whistleblower disclosure, after encountering much difficulty with senior administrators in the Australian National University, following concerns raised by the Office of the Commonwealth Ombudsman, the management of the Australian National University made arrangements for officials from Deloitte to investigate the whistleblower disclosure that I had made on behalf of the Australian National University.

[70] I was particularly troubled by the way that the investigators engaged by the Australian National University handled the whistleblower disclosure that I had made. I lodged a complaint with the Office of the Commonwealth Ombudsman about the handling of the whistleblower disclosure I had made.

[71] I noted, in my complaint, that the investigators had recorded denigratory remarks about me in their investigation report and that I had been denied an opportunity to respond or rebut those denigratory remarks.

[72] Essentially, I was denied procedural fairness.³⁴

III-B2.2. The essentials of the Commonwealth Ombudsman's investigation

[73] On 21 September 2020, Ms Cassandra Hodzic, a delegate of the Commonwealth Ombudsman wrote to me about the outcome of an investigation, under the *Ombudsman Act 1976* (Cth), into the manner in which a disclosure investigation was conducted, by officials contracted by the Australian National University, under the *Public Interest Disclosure Act 2013* (Cth).³⁵

[74] The essentials of Ms Hodzic's investigation were:

- a) the Australian National University engaged an external investigator (the consultancy firm *Deloitte*) to investigate the substance of a public interest disclosure that I made under the *Public Interest Disclosure Act 2013* (Cth); and
- b) a report was prepared by the investigator for the purposes of the *Public Interest Disclosure Act 2013* (Cth); and
- c) the report prepared by the investigator for the purposes of the *Public Interest Disclosure Act 2013* (Cth) was provided to Ms Hodzic upon her request;³⁶
- d) the investigator included assessments about my character in the public interest disclosure report, and that those assessments of character included that I was “untrainable” and that “he is a liar [and] a manipulator”; and
- e) I took exception to the inclusion of those adverse assessments of character in the public interest disclosure report, and raised the inclusion of those adverse character assessments as

³⁴ This is not merely a personal opinion.

The Australian National University's own *Procedure: public interest disclosure materials*, which is published on the University's website <https://policies.anu.edu.au/ppl/document/ANUP_006403>, explicitly sets out, at paragraph 73 under the subheading “Procedural fairness”, that “[w]here the investigator in preparing the report of their investigation proposes to:

- a) make a finding of fact, or
- b) express an opinion that is adverse to the discloser, to a Public Official who is the subject of the disclosure or to another person: the investigator or delegate must give the person who is the subject of that proposed finding or opinion a copy of the evidence that is relevant to that proposed finding or opinion and must give the person a reasonable opportunity to comment on it.”

By the standards acknowledged in the Australian National University's own procedural materials, I was denied procedural fairness.

³⁵ The investigation report is annexed to these submissions – see pages 34 – 35.

³⁶ In the Ombudsman's investigation notice, Ms Hodzic states “[a]t our request, the ANU provided our Office with an unredacted copy of the report and records of witness interviews”: see page 34.

a ground of complaint; and

f) Ms Hodzic “requested additional information from the ANU to enable [the Office of the Commonwealth Ombudsman] to better understand what evidence the investigator considered in reaching particular conclusions, and if the investigator did not consider or give weight to certain material or allegations, why”;³⁷ and

g) despite issuing requests, “on a number of occasions between April and August 2020”,³⁸ for the additional information to assist with Ms Hodzic's investigation, officials at the Australian National University “did not provide a response”;³⁹ and

h) Ms Hodzic chose to advance consideration of my complaint in the absence of the information requested from the Australian National University;⁴⁰ and

i) Ms Hodzic “formed the view that the investigation report [prepared by the ANU's investigator] did not adequately explain the basis for some of the investigator's finding”;⁴¹ and

j) despite claiming that she would “progress [the Ombudsman's] investigation of [the] complaint based on the information available to [the Ombudsman]”, Ms Hodzic claimed it was “difficult for [her] to be satisfied that the [ANU] investigator's findings were reasonably open” for the investigator to make on account of the ANU not complying with the Ombudsman's repeated requests for information.⁴²

[75] Ms Hodzic terminated the investigation under the *Ombudsman Act 1976* (Cth) because, in the light of the ANU's failure to respond to requests for information, she “did not think that further investigation would be likely to result in a different outcome for [me]”.⁴³

III-B2.3. An assessment of the essentials of Ms Cassandra Hodzic's investigation, under the *Ombudsman Act 1976* (Cth), of my complaint about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth)

[76] Several glaring errors leap out from the two page decision notice that Ms Hodzic provided to me.

[77] Parliament has explicitly provided the Commonwealth Ombudsman with the authority to investigate matters.⁴⁴

[78] From the very inception of the Office of the Commonwealth Ombudsman,⁴⁵ as part of the investigative powers conferred on the Commonwealth Ombudsman, the Parliament granted the Ombudsman the power to *compel* a person to furnish information, or produce documents or other

³⁷ See page 34.

³⁸ See pages 34 – 35.

³⁹ See page 35.

⁴⁰ In the Ombudsman's investigation notice, Ms Hodzic states “[i]n the circumstances, we decided to progress our investigation of your complaint based on the information available to us”: see page 34.

⁴¹ See page 35.

⁴² In the Ombudsman's investigation notice, Ms Hodzic states “[a]s the ANU did not provide us with the additional information we requested, it was difficult for us to be satisfied that the investigator's findings were reasonably open”: see page 35.

⁴³ See page 35.

⁴⁴ *Ombudsman Act 1976* (Cth), s 8.

⁴⁵ Act No 181 of 1976.

records, relevant to an investigation under the *Ombudsman Act 1976* (Cth).⁴⁶

[79] In this instance, Cassandra Hodzic requested that officials in the ANU provide information in furtherance of the investigation commenced under section 8 of the *Ombudsman Act 1976* (Cth).⁴⁷ By her own admission, despite issuing requests, “on a number of occasions between April and August 2020”, for information to assist with the investigation under the *Ombudsman Act 1976* (Cth), officials at the Australian National University “did not provide a response.”⁴⁸

[80] It beggars belief that, in the face of such shameless disdain for the authority of the Office of the Commonwealth Ombudsman, the Ombudsman's delegate did not, following the refusal to comply with the request for information, *compel* the production of the information.

[81] I am immediately reminded of the the Hon Catherine Holmes' criticisms of the Office of the Commonwealth Ombudsman in her report of the Royal Commission into the Robodebt Scheme. Specifically, the Royal Commissioner noted the following:⁴⁹

The responses to requests made for information in the 2017 own motion investigation warranted the use of the s 9 powers in the Ombudsman Act, particularly the associated power to examine on oath, to compel answers as to why the obvious inconsistencies and deficiencies in production of information were occurring and to require production of the documents which were so obviously missing.

[82] In the case of Robodebt, at least officials in the Department of Social Services feigned an interest in cooperating with the Office of the Commonwealth Ombudsman. Officials at the Australian National University did not even dignify Ms Hodzic's requests about the investigation of my public interest disclosure with a response.

[83] How much more contemptuous must the conduct of officials be in response to a request for information before the Commonwealth Ombudsman, or his delegates, decide to exercise the powers to compel the production of information or documents, particularly in the light of the Ombudsman's *investigative* role?

[84] That is not the worst of it.

[85] Ms Hodzic stated, in her reasons for decision, that, in the light of the failure of officials providing information in response to her requests, she would “progress [the Ombudsman's] investigation of [the] complaint based on the information available to [the Ombudsman].”⁵⁰ But Ms Hodzic did no such thing.

[86] Rather than “progress [the Ombudsman's] investigation of [the] complaint based on the information available to [the Ombudsman]”, Ms Hodzic reasoned that:

a) “it was unclear whether [Peter Tregear] had been given an opportunity to respond to” the “comments 'he is a liar, a manipulator' and 'untrainable' having been included in the investigation report”; and

⁴⁶ *Ombudsman Act 1976* (Cth), s 9(1).

⁴⁷ Presumably, Ms Hodzic was relying on subsection 8(3) of the *Ombudsman Act 1976* (Cth), which provides that “the Ombudsman may, for the purposes of this Act, obtain information from such person, and make such inquiries, as he or she thinks fit.”

⁴⁸ See page 35.

⁴⁹ The Hon Catherine Holmes AC SC, *Report of the Royal Commission into the Robodebt Scheme* (2023), page 581 <<https://robodebt.royalcommission.gov.au/publications/report>>.

⁵⁰ See page 35.

b) “[a]s the ANU did not provide us with the additional information we requested, it was difficult for us to be satisfied that the investigator's findings were reasonably open”; and

c) therefore, the investigation would be terminated because the delegate did “not think that further investigation would be likely to result in a different outcome.”

[87] The inadequacies in Ms Hodzic's reasoning are disturbing.

[88] Ms Hodzic did not “progress [the Ombudsman's] investigation of [the] complaint based on the information available to [the Ombudsman].” Had Ms Hodzic done so, she would have concluded that the evidence of the adequacy of the investigation was lacking, and, on the basis of the information before her, concluded that the investigation did not meet the requirements of procedural fairness.

[89] Instead:

a) Ms Hodzic claimed that the information before her was not sufficient for her “to be satisfied that the investigator's findings were reasonably open” to be made; and

b) despite requesting information from the ANU under section 8 of the *Ombudsman Act 1976* (Cth), and having her request ignored repeatedly, Ms Hodzic *chose* not to exercise the powers that Parliament had explicitly granted to the Ombudsman and, by virtue of the authority to delegate that power, his delegates to compel the production of relevant information under section 9 of the *Ombudsman Act 1976* (Cth); and

c) on account of the dearth of information relevant to the *investigation* commenced under section 8 under the *Ombudsman Act 1976* (Cth), which was of Ms Hodzic's making given that it was well within her power to compel the production of the information (should it have existed), Ms Hodzic claimed that there was inadequate evidence for her “to be satisfied that the investigator's findings [about Peter Tregear] were reasonably open”; and

d) Ms Hodzic leapt to the conclusion that “further investigation would [not] be likely to result in a different outcome”, thus justifying the termination of the investigation under section 12 of the *Ombudsman Act 1976* (Cth).

[90] Despite the obvious fallacies of reasoning, Ms Hodzic washed her hands of the complaint because, as I construe her reasons, investigating the matter according to law became an inconvenience.

III-B2.4. An independent oversight authority to complain to about the failures of officials in the Office of the Commonwealth Ombudsman

[91] For the reasons set out in part II of these submissions, the Bill fails to address the prima facie concerns of three parliamentary committees about the immunities from legal action granted to the Commonwealth Ombudsman and his officials. As it stands, for the reasons set out in part II of these submissions, there is virtually no prospect for sustaining an application for judicial review of unlawful decisions made by officials in the Office of the Commonwealth Ombudsman unless those decisions rise to the level of jurisdictional error or a decision made in bad faith.

[92] Beside that fact that there is no meaningful avenue for judicial review, there is no prospect for a whistleblower aggrieved by the unsatisfactory conduct of officials in the Office of the

Commonwealth Ombudsman to lodge an application for review of the merits of an unsatisfactory decision with an *independent* and *transparent* administrative body. The Bill does nothing to address this glaring deficiency.

[93] Aside from the fact that the immunities from legal action will extend to the decisions of the proposed Whistleblower Ombudsman, the Whistleblower Ombudsman will not be independent of the Office of the Commonwealth Ombudsman, and will not offer any independent oversight of the operations of staff in the Office of the Commonwealth Ombudsman.

[94] Under the Bill, the proposed Whistleblower Ombudsman will be nothing more than a glorified member of the Commonwealth Ombudsman's staff. Indeed, the “reforms” set out in the Bill could just as easily be effected without any reference to a “Whistleblower Ombudsman”.

[95] The real problems facing the Office of the Commonwealth Ombudsman are both structural and cultural, and will not be remedied by the Bill.

[96] The Commonwealth Ombudsman's office has a problem in respect of attracting high quality public servants to undertake the functions of that office. The Commonwealth Ombudsman's failures during unlawful Robodebt debacle is a testament to that fact.⁵¹ But, as my case study demonstrates, the Commonwealth Ombudsman's failures during the Robodebt debacle are not an isolated incident.

[97] There is a culture of weakness and torpor in the Office of the Commonwealth Ombudsman, and that degenerate culture has become something of an entitlement amongst the Ombudsman's officials because, in the light of statutory immunities from legal action, the Commonwealth Ombudsman and his officials have, by the Federal Parliament, been empowered to turn a blind eye to administrative failures (in my case, the failures of the ANU's investigators to provide me with procedural fairness) with impunity.

[98] The Bill does nothing to address the structural and cultural problems that, in great measure, if inadvertently, have been entrenched in that office by poor decisions in the legislative process.

III-B3. Empowering an *effective* and *independent* Whistleblower Ombudsman (i.e. Inspector) – proposals for reform

III-B3.1. Introduction

[99] Just as the National Anti-Corruption Commissioner has an inspector, so too, I submit, should there be an inspector for the public interest disclosure scheme. The title of the inspector is of little significance. The inspector could be referred to as the “Whistleblower Ombudsman”.

[100] While I could adopt that nomenclature, it is, for the sake of clarity, more sensible to refer to the independent official who has responsibility for administrative oversight of the Commonwealth Ombudsman's operations under the *Public Interest Disclosure Act 2013* (Cth) as “the Inspector” to avoid potential confusion between the terms “Whistleblower *Ombudsman*” and “Commonwealth *Ombudsman*”.

[101] The role of the Inspector would be focused. The Inspector would not have sweeping discretionary powers.

51 Senator Gallagher referred to Robodebt as “the worst failure of public administration in history”: <https://www.katygallagher.com.au/media-centre/media-releases/update-on-robodebt-royal-commission-reforms/>

[102] As I see it, the role of the Inspector would be to assess, upon receiving applications, whether the Commonwealth Ombudsman or his staff members are approaching the task of conducting investigations, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in respect of complaints received about inadequacies in investigations conducted under the *Public Interest Disclosure Act 2013* (Cth), in a manner that reflects best practice.⁵²

[103] Essentially, the role of the Inspector would be one of partial *merits review*.⁵³

[104] Specifically, the Inspector will consider the merits of decisions made, under the *Ombudsman Act 1976* (Cth), section 55 of the *Public Interest Disclosure Act 2013* (Cth), subordinate legislation and policy, to determine whether the Commonwealth Ombudsman or his officials have undertaken their tasks in a manner that meets community expectations and the mandate the Ombudsman was given, by the Parliament, to ensure that investigations conducted under the *Public Interest Disclosure Act 2013* (Cth) are being conducted such that the disclosures are being properly investigated and dealt with (i.e. in accordance with the explicit purpose set out in paragraph 6(d) of the *Public Interest Disclosure Act 2013* (Cth)).

[105] Upon assessment, the Inspector would be empowered to issue directions to the Ombudsman or his officials about how the Ombudsman's investigation might require reconsideration.

III-B3.2. Establishing the office of the Inspector

[106] For the sake of statutory “cleanliness”, my view is that the *Ombudsman Act 1976* (Cth) should **not** be amended to establish the office of the Inspector. Rather, a free standing piece of legislation should be the basis for establishing the position of Inspector.

[107] The legislation should establish the Office of the Inspector. The Inspector would be a statutory office holder for the purposes of the *Public Service Act 1999* (Cth), which means that the Inspector would be bound by the APS Values.⁵⁴

[108] The new enactment would provide that *administrative* staff members (e.g. an executive assistant to the inspector, IT support, a review intake officer etc.) assisting the Inspector must be persons engaged under the *Public Service Act 1999* (Cth), and made available to the Inspector by the Secretary of the Attorney-General's Department. In other words, the “agency head” responsible for the *administrative* staff supporting the Inspector would be the Secretary of the Attorney-

52 The Ombudsman's, and his officials', failures to exercise their powers as intended was the subject of sustained inquiry and criticism during the Robodebt Royal Commission. Unfortunately, because there is such little oversight of the way that the Ombudsman and his officials operate, it took a Royal Commission to expose the incompetence and timidity of officials in the Office of the Commonwealth Ombudsman (as to which, please refer to chapter 21 of the Report of the Royal Commission into the Robodebt Scheme: <https://www.royalcommission.gov.au/robodebt/report>). Perhaps the most disturbing revelation from the Robodebt Royal Commission was the lengths to which officials in the Office of the Commonwealth Ombudsman went to sacrifice the independence of that office. The case study referred to in these submissions serves to further support the view that officials in the Office of the Commonwealth Ombudsman are failing to apply the law as it was intended by the Parliament, and are letting down whistleblowers in the process.

Ironically, the Commonwealth Ombudsman chastised the public service, in his report *Room for Improvement: Observations from the Ombudsman*, for failing to apply the law as intended by the Parliament: see, Iain Anderson, *Room for Improvement: Observations from the Ombudsman*, 3 September 2023

<https://www.ombudsman.gov.au/data/assets/pdf_file/0019/300475/Room-for-Improvement-Observations-from-the-Ombudsman.pdf> (accessed on 30 June 2025).

53 I say *partial merits review* because the review contemplated would not be *de novo* review (in the sense that the Inspector would step into the proverbial shoes of the original investigator and conduct the investigation).

54 *Public Service Act 1999* (Cth), s 14.

General's Department.

[109] For the purposes of the *Public Governance, Performance and Accountability Act 2013* (Cth), there would be good sense in explicitly setting out how the Secretary of the Attorney-General's Department would be responsible for catering to the needs of the Inspector, by entering into arrangements, such as contracts, on behalf of the Commonwealth, in furtherance of the Inspector's work.

[110] The Inspector would be appointed by the Governor-General on the recommendation of the Attorney-General, following approval of the candidate by a joint parliamentary committee.⁵⁵ The appointment should be for a maximum of five years, and the Governor-General should be able to reappoint a person to the position of inspector on the recommendation of the on the recommendation of the Attorney-General, following approval of the candidate assessor by a joint parliamentary committee, subject to the joint parliamentary committee approving of the nomination for re-appointment.

[111] The minimum qualifications for appointment as Inspector should be:

- a) enrolment and practise as an Australian legal practitioner for at least seven years, with considerable experience practising in administrative law;⁵⁶ or
- b) past service as a Judge of the Federal Court of Australia, or a State or Territory Supreme Court,

in addition to the consent of the person being nominated by the Attorney-General.⁵⁷

III-B3.3. Assessors

[112] The enactment would also establish the positions of assessors (or whatever other title the Parliament thinks appropriate).

[113] The assessors would *not* be engaged under the *Public Service Act 1999* (Cth).

[114] Assessors would be, like sessional members of the Administrative Review Tribunal, appointed by the Governor-General on the recommendation of the Attorney-General, following approval of the candidate assessor by a joint parliamentary committee.

[115] The enactment ought to provide minimum qualifications for appointment, such as:

- a) enrolment and practise as an Australian legal practitioner for at least five years, with considerable experience practising in administrative law;⁵⁸ or

⁵⁵ More on the joint parliamentary committee later.

⁵⁶ I use the term Australian legal practitioner in the way that term is used in the *Legal Profession Uniform Law*, which is set out in Schedule 1 of the *Legal Profession Uniform Application Act 2014* (Vic). Practical experience practising as a lawyer is, I think, important, which is why I have not suggested that the person merely be enrolled as a legal practitioner for five years.

⁵⁷ I should hate to think that a person might be nominated, approved by the joint parliamentary committee, appointed by the Governor-General, only for that person's consent to the nomination and appointment to have never been provided.

⁵⁸ I use the term Australian legal practitioner in the way that term is used in the *Legal Profession Uniform Law*, which is set out in Schedule 1 of the *Legal Profession Uniform Application Act 2014* (Vic). Practical experience practising as a lawyer is, I think, important, which is why I have not suggested that the person merely be enrolled as a legal practitioner for five years.

b) appointment as a general member, senior member or a non-judicial deputy president of the Administrative Review Tribunal, with experience and skills that, in the opinion of the Attorney-General, makes the relevant member of the Administrative Review Tribunal an appropriate candidate for appointment as an assessor; or

c) appointment as an officer of a State or Territory review tribunal (e.g. the Queensland Civil and Administrative Tribunal), with experience and skills that, in the opinion of the Attorney-General, makes the relevant officer an appropriate candidate for appointment as an assessor; or

d) professional experience and skill that, though not captured in points a), b) or c), makes the relevant person an appropriate candidate for appointment as an assessor;⁵⁹

in addition to the consent of the person being nominated by the Attorney-General.

[116] Importantly, the enactment will provide that the pay of assessors, all of whom are to be engaged to work on a sessional basis, will be determined by the Remuneration Tribunal. I envisage that the pay structure will be similar to that of sessional members of the of the Administrative Review Tribunal, which is set out in the *Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2024*. In other words, assessors would be paid using daily rates and called on by the Inspector as, and when, work is available.

III-B3.4. Grounds of review

[117] The grounds of merits review of decisions of the Commonwealth Ombudsman or officials in the Office of the Commonwealth Ombudsman pertaining to investigations, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), of complaints about inadequacies in the investigation of whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth) would be, broadly, four fold. They would be:

a) a failure to meet best practice in respect of making administrative decisions under relevant enactments; and/or

b) a failure to exercise, without adequate justification, powers to compel the production of evidence or materials, particularly where the context of the complaint suggests that the exercise of such powers would be warranted; and/or

c) acts or omissions of relevant officials being unreasonable, unjust, or oppressive in their effects, irrespective of whether the acts or omissions are lawful or unlawful; and/or

d) unlawful conduct.

[118] Naturally, errors of law or fact would be caught by these grounds. So too would, for example:

a) failing to take relevant evidence into consideration; or

⁵⁹ This final catch all provision, which contrasts against the more concrete and specific qualifications set out in the points prior, would be relied on by the Attorney-General to recommend, for example, an academic with years of experience teaching administrative law, or a legal practitioner with considerable experience in *corporate* (i.e. not administrative) law, but with a focus on whistleblower disclosures made under the *Corporations Act 2001* (Cth), or an Australian legal practitioner who, while an expert in the field of administrative law, has not been enrolled as a legal practitioner in Australia for 5 years (though has many years of experience practising in the field of administrative law in, for example, New Zealand or Singapore), etc.

- b) taking irrelevant evidence into consideration; or
- c) failing to take logically probative evidence into consideration; or
- d) taking evidence into consideration that is not logically probative.

III-B3.5. Review intake

[119] The relevant legislation should provide that where a whistleblower:

- a) wishes to submit an application for review about the way the Ombudsman or one of his officials handled a complaint about the inadequacies of an investigation under the *Public Interest Disclosure Act 2013* (Cth); or
- b) has submitted an inadequately articulated application for review,

the Inspector will make arrangements, through members of his or her staff (i.e. the complaints intake officer (who might also be the executive assistant to the inspector, or the office manager – that is a resource management matter)) to assist the whistleblower to submit an application for review in an appropriate manner.

[120] There is considerable merit in including a provision allowing a person to represent the whistleblower in his or her dealings with the Inspector's office, so long as the whistleblower provides the Inspector with such an authorisation in writing, and the authorisation is to the satisfaction of the Inspector.

III-B3.6. Powers to compel the production of information or artefacts

[121] The Inspector, and each and every assessor, should be able to compel the production of any and all artefacts, including documents, in the control of the Office of the Commonwealth Ombudsman that relate to the application for review submitted.

[122] The Inspector, and each and every assessor, should be able to compel the Commonwealth Ombudsman and other officials in the Office of the Commonwealth Ombudsman to provide any and all information that relates to the application for review submitted.

[123] The law should also provide that the Inspector, and each and every assessor, may compel the Commonwealth Ombudsman and other officials in the Office of the Commonwealth Ombudsman to appear before them and, on oath or affirmation, provide evidence.

III-B3.7. Decision-maker

[124] While ultimately a matter for the Parliament, I think it sensible for the *formal* decision maker, in respect of *all* decisions pertaining to the manner in which the Ombudsman or his staff have handled complaints about inadequate whistleblower disclosure investigations, under the *Public Interest Disclosure Act 2013* (Cth), to be the Inspector.

[125] In line with that view, assessors will, as part of their work, consider applications for review, conduct investigations and prepare their reasons, and submit their reasons and evidence in support to the Inspector for the Inspector's consideration. Once considered, the Inspector may:

- a) endorse the reasons in full, such that the reasons form the basis of his or her decision; or

- b) amend the reasons so that they reflect the views of the Inspector, and then use the amended reasons as the basis for his or her decision; or
- c) return the reasons to the assessor and ask the assessor to look further into issues of concern before the reasons are again submitted to the Inspector for further consideration.

[126] Naturally, views may differ, and some may think it appropriate for the assessors to be decision makers. If so, a provision should be included in the legislation that the Inspector is not permitted to direct assessors in the manner in which they make their decisions (i.e. assessors should be *independent* decision makers).

III-B3.8. Publishing decisions and reasons for decision

Introduction

[127] Given that the role of the Inspector will be to assess the merits of how the Commonwealth Ombudsman or his officials have considered applications for review lodged about the manner in which investigations of whistleblower disclosures have been handled under the *Public Interest Disclosure Act 2013* (Cth), the Inspector would not be dealing with the substance of the allegations of wrongdoing contained in the whistleblower disclosure.

[128] The Inspector's role is, rather, to deal with the merits of complaints handling processes. As such, the substance of the any decision made by the Inspector would be about good administrative decision making by officials in the Office of the Commonwealth Ombudsman.

[129] The legislation should explicitly provide that the Inspector *must* publish, on the Inspector's webpage, each and every one of his or her reasons for decision in respect of applications for review of decisions made by the Commonwealth Ombudsman or his officials pertaining to complaints of inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth). Each decision should bear an appropriate unique identifier.^{60 61}

Proposed provisions

[130] The enactment should provide that:

- a) the Inspector must publish his or her reasons within 90 days after delivering those finalised reasons to the person who submitted the application for review;⁶² and
- b) the Inspector may apply use pseudonyms for whistleblowers, third parties who are not public-servants (or who have been public servants but are not connected with the issues identified in the application for review) and, where appropriate, officials in the Office of the Commonwealth Ombudsman;
- c) the Inspector may apply redactions to *sensitive personal information*, as defined in the

⁶⁰ For example, the identifier may be in the nature of medium neutral citations utilised by the Australian Information Commissioner in respect of decisions issued by the Information Commissioner, or the Freedom of Information or Privacy Commissioners.

⁶¹ The concept of medium neutral citations is set out in the Australian Institute of Judicial Administration's *Guide to Uniform Production of Judgments* (1999), edited by the Hon L T Olsson. I commend that work to the Legal and Constitutional Affairs Committee.

⁶² I think the 90 days provided to the inspector should be enough time for the inspector to consider any redactions that should be applied, in the light of the legislated standard.

Privacy Act 1988 (Cth).

No power to redact reasons for decision, other than in respect of sensitive personal information

[131] The enactment should also provide that the Inspector is not permitted to redact anything other than *sensitive personal information* in his or her reasons for decision. In other words, references to the titles of documentary evidence, the substance of evidentiary materials considered, and the like, must not be redacted.

Alternative proposal with respect of the Inspector's powers to redact reasons for decision

[132] If, contrary to the submission set out above, the view is that the Inspector should have the authority to redact reasons for decision published on the Inspector's website, I submit that the powers should be qualified, and subject to institutional checks.

Power to redact only in exceptional circumstances

[133] I submit that any provision in respect of the Inspector having the power to redact should provide that the Inspector must not redact anything in her reasons for decision, unless he or she is convinced that *exceptional circumstances* exist for redacting that data.

[134] In considering the meaning of *exceptional circumstances*, the legislation should limit the discretion open to the Inspector to identifiable grounds. As I see it, those limited grounds should include:

- a) documents that are Cabinet in confidence; and
- b) documents, the disclosure of which would constitute a contempt of the Federal or State Parliaments, or the courts of Australia; and
- c) documents affecting enforcement of law and protection of public safety (as defined in section 37 of the *Freedom of Information Act 1982* (Cth)).

[135] I would counsel against the proliferation of relevant grounds. I would be disappointed if, for example, the exemptions set out in Part IV, Division 2 of the *Freedom of Information Act 1982* (Cth) were to be transplanted *tout-court* as grounds that the Inspector should consider in determining whether the most exceptional circumstances exist for redacting data from his or her decisions.

Unredacted copies of redacted reasons for decision must be provided to the joint parliamentary committee

[136] If the Inspector is provided with the power to redact reasons for decision in exceptional circumstances, then the enactment should provide that unredacted copies of each of the redacted reasons for decision must be provided to the joint parliamentary committee with oversight of the Inspector's work in respect of each relevant reporting period.⁶³

[137] The enactment should also provide that, by default, the unredacted copies of each of the redacted reasons for decision must, upon being provided to the joint parliamentary committee for the relevant reporting period, be tabled during the relevant hearing unless the Inspector advances a

⁶³ Further submissions will be made in respect of a joint parliamentary committee, and its powers and functions, below.

public interest immunity claim in respect of the tabling of the relevant reasons for decision.⁶⁴

[138] There is at least one strong justification for the provision, to the joint parliamentary committee, of unredacted copies of each of the redacted reasons for decision, which is that provision of the unredacted reasons for decision provides the members of the committee with the opportunity to monitor the frequency and basis of the use, by the Inspector, of the power to redact reasons for decision in *exceptional circumstances*.⁶⁵ On a more general level, the members of the committee will have access to information about how an integral part of the Commonwealth's public sector whistleblowing scheme is actually operating, which is a far cry from the existing state of affairs.

III-B3.9. Power to issue directions to the Commonwealth Ombudsman or his officials, and offences for failing to comply

[139] I submit that the legislation should provide that the Commonwealth Ombudsman and his officials *must* comply with any directions issued as part of the Inspector's decision in respect of an application for review.

[140] Subject to a timely application to a court of competent jurisdiction for a stay of the directions given by the Inspector, with a view to setting the directions aside for reviewable error, a failure to comply with the Inspector's directions or decision, by the Commonwealth Ombudsman or his officials, should be an offence, punishable by 3 months in prison, or a fine of \$5,000, or both. Naturally, since the Governor-General may either:

- a) suspend the Commonwealth Ombudsman from office on the ground of misbehaviour;⁶⁶ or
- b) remove the Commonwealth Ombudsman from office on an address praying for his or her removal on the ground of misbehaviour being presented to the Governor-General by each House of the Parliament in the same session of the Parliament,⁶⁷

the Commonwealth Ombudsman will have plenty of incentive to comply with the directions and/or decisions of the Inspector.

[141] Similarly, the Ombudsman's officials will have plenty of incentive to comply with the directions or decisions of the Inspector given that they might end up in prison or be forced to part with their money.

[142] The legislation should make clear that the Commonwealth Ombudsman or his officials must comply with the directions or decision of the inspector within the time permitted by the Inspector. If the directions or decision do not set out a time for compliance, the legislation should make clear that compliance is to be within 30 days of the Commonwealth Ombudsman being *personally* notified of the decision.⁶⁸

⁶⁴ Further submissions will be made in respect of public interest immunity claims below.

⁶⁵ Naturally, should the inspector's view of what constitutes *exceptional circumstances* not align with the views of members of the joint parliamentary committee, members of the committee may be able to consider, from an informed position, the desirability of amendments to the legislation giving the inspector the power to

⁶⁶ *Ombudsman Act 1976* (Cth), s 28(2).

⁶⁷ *Ombudsman Act 1976* (Cth), s 28(1).

⁶⁸ Notification need not be by personal service; an email or letter should suffice. As a matter of policy, the inspector should ensure that each and every decision, issued in respect of an application for review, be sent to the Commonwealth Ombudsman's government issued email address. Presumptions about the receipt of emails are set out in the *Electronic Transactions Act 1999* (Cth), s 14A.

[143] It should also be made clear, in the legislation, that anybody, including members of the public, will have a right to notify the Australian Federal Police that the Commonwealth Ombudsman or one of his officials has failed to comply with the directions or decision of the Inspector.

III-B3.10. Judicial review

[144] As with other administrative decisions, the decisions of the Inspector should be amenable to judicial review under the ADJR Act. Filing fees and costs associated with such proceedings should be what they ordinarily are.

III-B3.11. Freedom of information

[145] It should be made clear, in the relevant legislation, that the Inspector's documents may be the subject of access applications under the *Freedom of Information Act 1982* (Cth).

[146] Documents pertaining to the administrative staff and functions of the Office of the Inspector will be subject to applications, under the *Freedom of Information Act 1982* (Cth), to the Attorney-General's Department.

III-B3.12. Reporting obligations

[147] The relevant enactment should set out the reporting obligations that apply in respect of the work of the Inspector.

[148] The Inspector should be required to prepare biannual reports.

[149] Data in the biannual reports prepared by the Inspector should include, amongst other things:

- i) the number of applications for review received in the relevant reporting period; and
- ii) the number of decisions made in respect of applications for review in the relevant reporting period; and
- iii) a list of the decisions made in the relevant reporting period, setting out, in respect of each decision in the list, the grounds of review relied on by the applicant, the grounds upheld, the grounds not upheld, and the final decision (along with any directions); and
- iv) any referrals made to the Australian Federal Police, by the Inspector or assessors, about failures to comply with directions or decisions in the relevant reporting period; and
- v) the adequacy, or otherwise, of administrative staff supporting the Inspector and the assessors in the relevant reporting period; and
- vi) whether concerns have been relayed to the Secretary of the Attorney-General's Department about administrative staffing arrangements, and, if so, the Secretary's response to those concerns in the relevant reporting period; and
- vii) whether concerns have been relayed to the Secretary of the Attorney-General's Department about arrangements governed by the Finance Law affecting the functions

of the inspector,⁶⁹ and, if so, the Secretary's response to those concerns in the relevant reporting period; and

viii) the general state of the Commonwealth Ombudsman's handling of complaints about whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth) in the relevant reporting period.

[150] Separately, on an annual basis, the Secretary of the Attorney-General's Department must table a report setting out, amongst other things:

- a) the annual expenditure on administrative staff supporting the work of the Office of the Inspector; and
- b) the particularised annual expenditure on goods and services procured to advance the functions of the Office of the Inspector.

[151] The Secretary's annual report should be prepared, to the extent practicable, in accordance with the requirements of the *Public Governance, Performance and Accountability Act 2013* (Cth) and, in particular, Division 3A of Part 2-3 of the *Public Governance, Performance and Accountability Rule 2014* (Cth).

III-C. The importance of independent and effective parliamentary oversight of the operations of the Commonwealth Ombudsman, in respect of his complaints administration functions for the *Public Interest Disclosure Act 2013* (Cth) scheme

III-C1. Introductory comment

[152] In the light of the systemic failures, on the part of the Office of the Commonwealth Ombudsman, identified by the Hon Catherine Holmes in her Report of the Royal Commission into the Robodebt Scheme,⁷⁰ as well as the failures identified in the case study set out in these submissions, the importance of having an independent and effective form of parliamentary oversight of the operations of the Commonwealth Ombudsman, in respect of the Commonwealth Ombudsman's administration of complaints arising from inadequate or improper disclosure investigations under the *Public Interest Disclosure Act 2013* (Cth), should be obvious.

III-C2. Effective parliamentary oversight - Establishment and constitution of a joint parliamentary committee

III-C2.1. Introduction

[153] A joint parliamentary committee for the oversight of whistleblower activities, be they under the *Public Interest Disclosure Act 2013* (Cth), the *Corporations Act 2001* (Cth),⁷¹ or other legislation, should be established.

⁶⁹ *Public Governance, Performance and Accountability Act 2013* (Cth), subordinate legislation (e.g. the *Public Governance, Performance and Accountability Rule 2014* (Cth)), and associated instruments (e.g. Commonwealth Procurement Rules) and policies.

⁷⁰ The Hon Catherine Holmes AC SC, *Report of the Royal Commission into the Robodebt Scheme* (2023), chapter 21 <<https://robodebt.royalcommission.gov.au/publications/report>>. In particular, please refer to the criticisms of the Royal Commissioner about the failures of the Commonwealth Ombudsman, and his staff members, to adequately exercise the investigative powers that they had been furnished with by the Parliament, set out on page 581 of the *Report of the Royal Commission into the Robodebt Scheme*.

⁷¹ *Corporations Act 2001* (Cth), Part 9.4AAA.

[154] The joint parliamentary committee should be constituted by twelve members, with six members from the House of Representative and six from the Senate.

III-C2.2. Membership of the joint parliamentary committee from representatives in the House of Representatives

[155] Of the six members from the House of Representatives:

- a) subject to there being one,⁷² one of the members of the joint parliamentary committee would be a representative from neither the Government nor the Opposition; and
- b) subject to there being two, two of the members of the joint parliamentary committee would be from the Opposition; and
- c) the remaining members of the joint parliamentary committee would be from the Government.

[156] If the House of Representatives is not constituted such that a representative is not from the Government or the Opposition, where the Opposition is able to field a third person, the Opposition shall be entitled to the membership reserved for the representative from neither the Government or the Opposition on the joint parliamentary committee, though the Opposition may choose to forfeit the place ordinarily reserved for the representative from neither the Government nor the Opposition to the Government if the leader of the Opposition in the House notified the Speaker of the House of Representatives, in writing, of the decision to forfeit.

[157] If the House of Representatives is not constituted such that:

- a) the Opposition is able to field at least two representatives to participate as members of the joint parliamentary committee, and
- b) there are at least two representatives in the House of Representatives not from the Government or Opposition,

the representatives not from the Government or the Opposition shall, subject to forfeiting the benefit to the Government, be entitled to one of the two memberships ordinarily reserved for the Opposition on the joint parliamentary committee.

[158] In the unlikely event that there be neither Opposition, nor a representative not from the Government or the Opposition, in the House of Representatives, the Government shall be entitled to field six members from the House of Representatives to sit on the joint parliamentary committee.

III-C2.2. Membership of the joint parliamentary committee from the Senate

[159] Of the six members from the Senate:

- a) subject to there being two, two of the members of the joint parliamentary committee would be senators from neither the Government nor the Opposition; and
- b) subject to there being two, two of the members of the joint parliamentary committee would be senators from the Opposition; and

⁷² It is possible and even plausible that the House of Representatives be constituted by only members of the Government and the official Opposition. The law should reflect that possibility.

c) the remaining senatorial members of the joint parliamentary committee would be from the Government.

[160] Much like the House of Representatives' membership of the joint parliamentary committee, the legislation should be drafted to take account of contingencies in respect of the membership of senators, such as there being fewer than two senators from neither the Government nor the Opposition.

III-C3. Hearings before the joint parliamentary committee are to be public unless conditions apply for *in camera* hearings

III-C3.1. Default position on hearing before the joint parliamentary committee

[161] The legislation establishing a joint parliamentary committee for whistleblower activities should explicitly provide that hearings before the committee are to be public and open unless the committee determines that relevant statutory conditions are met for *in camera* hearings.

III-C3.2. *In camera* hearing of the joint parliamentary committee

[162] The legislation should explicitly provide that, where the statutory conditions are met for *in camera* hearings, those *in camera* hearings must be held within 10 days of the open hearing in which the conditions for the *in camera* hearings arose, subject, of course, to dissolution of:

- a) the House of Representatives; or
- b) the Senate; or
- c) both the House of Representatives and the Senate,

within those ten days.

III-C3.3. Grounds for *in camera* hearings of the joint parliamentary committee

[163] The legislation should provide that hearings shall only be held *in camera* to consider the substance of a public interest immunity claim advanced by a person during an open hearing.

[164] The legislation should also provide that, where the joint parliamentary committee determines, by a majority upon a vote, that the public interest immunity claim is not made out, the basis of the claim and the entire transaction between the witness who advanced the immunity claim and the committee must be published in Hansard.

[165] Moreover, the legislation should provide that:

- a) any documents presented to the joint parliamentary committee; and
- b) are the subject of a failed public interest immunity claim,

must be tabled as though the relevant documents were part of the transaction of the open hearing.

[166] The legislation should provide that, in the event of a tied vote, the public interest immunity claim shall be taken as defeated.

III-C4. Those appearing before the joint parliamentary committee may not withhold information from the committee

[167] The legislation establishing a joint parliamentary committee for whistleblower activities should explicitly provide that, other legislative provisions notwithstanding, those appearing before the joint parliamentary committee may not withhold information from the committee upon a request for information from any members of the committee. Consequential amendments to certain items of legislation (e.g. subsection 35(8) of the *Ombudsman Act 1976* (Cth)) are desirable and, thus, should be effected by the Parliament.⁷³

[168] The legislation should contain an explicit provision giving a person appearing before the joint parliamentary committee the right to object to responding to a request for information *only* on the ground that the request for information is not relevant to the committee's functions or purposes.

[169] The legislation should explicitly provide that, where an objection has been raised on the ground that the request for information is not relevant to the committee's functions or purposes:

- a) the joint parliamentary committee will, by majority vote, determine whether the relevant request for information is relevant to the committee's functions and purposes; and
- b) in the event of a tied vote, the objection raised on the ground that the request for information is not relevant to the committee's functions or purposes shall be taken as defeated.

III-C5. Those appearing before the joint parliamentary committee must use their best endeavours to respond to requests for information

⁷³ During the hearings of the Royal Commission into the Robodebt Scheme, the Commonwealth Ombudsman submitted to the Royal Commissioner that neither he nor his officials, past or present, could be compelled to disclose any information acquired in the course of activities conducted under, or for the purposes of, the *Ombudsman Act 1976* (Cth) or under Part V, Division 7 of the *Australian Federal Police Act 1979* (Cth): *Report of the Royal Commission into the Robodebt Scheme*, p 573, <<https://robodebt.royalcommission.gov.au/publications/report>>.

The basis of the Commonwealth Ombudsman assertion was subsection 35(8) of the *Ombudsman Act 1976* (Cth), which provides:

A person who is or has been an officer is not compellable, in any proceedings before a court (whether exercising federal jurisdiction or not) or before a person authorized by a law of the Commonwealth or of a State or Territory, or by consent of parties, to hear, receive and examine evidence, to disclose any information acquired by him or her by reason of his or her being or having been an officer, being information that was disclosed or obtained under the provisions of this Act or under Division 7 of Part V of the *Australian Federal Police Act 1979*.

Royal Commissioner Holmes “did not entirely accept this view but agreed to proceed on the basis that the Ombudsman would assist the Commission voluntarily”: *Report of the Royal Commission into the Robodebt Scheme*, p 573.

In the event that the Parliament were to forbid those appearing before the the joint parliamentary committee to withhold information from the committee upon a request for information from any members of the committee, I would encourage the Parliament to also amend the *Ombudsman Act 1976* (Cth) to explicitly provide that subsection 35(8) of the *Ombudsman Act 1976* has no application to hearings before the joint parliamentary committee for whistleblower protections.

There should be no opportunity provided to any public official to undermine the purposes or functions of joint parliamentary committee by refusing to respond to the committee's, or a member's, request for information.

[170] The relevant legislation should provide that those appearing before the committee must use their best endeavours to:

- a) assist the joint parliamentary committee with its agenda; and
- b) answer requests for information directly, or, where unable to provide direct answers, to provide as much relevant information on the matter under consideration.

III-C6. General functions of the joint parliamentary committee

[171] The functions of the committee would extend to, amongst other things:

- a) considering, and endorsing or rejecting, recommendations for the appointment of the inspector of the Office of the Inspector; and
- b) considering, and endorsing or rejecting, recommendations for the appointments of assessors of the Office of the Inspector; and
- c) receiving biannual reports from the Inspector; and
- d) receiving biannual reports from the Commonwealth Ombudsman on, amongst other things:
 - i) the matters that the Commonwealth Ombudsman is obligated to report about under paragraphs 76(2)(a), (c) and (d) of the *Public Interest Disclosure Act 2013* (Cth) in the relevant reporting period; and
 - ii) for the relevant reporting period, a list of the inspector's decisions that have not been complied with (i.e. either the substance of the decision was not complied with or, more specifically the directions were not complied with), and the reasons for non-compliance (e.g. a stay has been granted by a court of competent jurisdiction while the substance of the decision or directions is reviewed); and
 - iii) for the relevant reporting period, a summary, which includes a broad description of each of the grounds of complaint, of each complaint made to the Commonwealth Ombudsman about the conduct of agencies in relation to public interest disclosures; and
 - iv) for the relevant reporting period, a notation about the outcome or, if the matter is pending an outcome, the pending state of an outcome in respect of each complaint made to the Commonwealth Ombudsman about the conduct of agencies in relation to public interest disclosures; and
 - v) the general state of the Commonwealth Ombudsman's handling of complaints about whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth) in the relevant reporting period; and
- e) conducting a minimum of two hearings annually (outside of hearings conducted to consider recommendations for appointments), where, amongst others:
 - i) the Inspector of the Office of the Inspector; and

- ii) the Secretary of the Attorney-General's Department; and
- iii) the Commissioner of the Australian Federal Police; and
- iv) the lead officer or officers in the Australian Federal Police responsible for investigating offences arising from whistleblower disclosures; and
- v) the Commonwealth Director of Public Prosecutions; and
- vi) the lead prosecutor or prosecutors with appropriate responsibilities for whistleblower protection prosecutions; and
- vii) the Commonwealth Ombudsman,

will be present to answer questions about the state of the Commonwealth's whistleblower disclosure scheme; and

f) receiving annual reports from the Commissioner of the Australian Federal Police on, amongst other things, investigations arising from acts of whistleblower reprisal, referrals about the failure of the Commonwealth Ombudsman or his officials complying with decisions or directions of the Inspector, police education events pertaining to offences arising from whistleblower disclosures, and other matters set out in legislation; and

g) receiving annual reports from the Commonwealth Director of Public Prosecutions on, amongst other things, prosecutions arising from acts of whistleblower reprisal, referrals about the failure of the Commonwealth Ombudsman or his officials complying with decisions or directions of the Inspector, prosecutorial education events pertaining to offences arising from whistleblower disclosures, and other matters set out in legislation.

[172] This list of functions is, of course, illustrative and non-exhaustive.

PART IV – CONCLUSIONS

IV-A. Summation

[173] As noted, these submissions focus on two broad themes.

[174] The first is about the failure of the drafters of the Bill to heed concerns, identified in paragraphs 1.74 – 1.76 of the Legal and Constitutional Affairs Committee's report into the Whistleblower Protection Authority Bill 2025,⁷⁴ about the immunities from liability of officials in the proposed Whistleblower Protection Authority.

[175] The second is about the inadequacy of independent oversight of the operations of the Office of the Commonwealth Ombudsman in respect of the Ombudsman's exercise of powers and functions in respect of complaints about whistleblower disclosure investigation under the *Public Interest Disclosure Act 2013* (Cth).

[176] The Commonwealth Ombudsman's operations are virtually inscrutable in respect of the Ombudsman's dealings with whistleblowers because:

- a) as noted in part II of these submissions, there is virtually no avenue for judicial oversight available to whistleblowers aggrieved by unlawful decisions made by the Commonwealth Ombudsman or his officials; and
- b) as noted in part III-B of these submissions, there is no avenue for administrative oversight available to whistleblowers aggrieved by unmeritorious decisions made by the Commonwealth Ombudsman or his officials; and
- c) as noted in part III-C of these submissions, there is very little parliamentary oversight of the way in which the Commonwealth's whistleblower disclosure regimes *actually* operate.

[177] While the proposals, set out in Schedule 1, Part 1 of the Bill, to grant the Office of the Commonwealth Ombudsman additional powers and functions are welcome, neither of the two key issue identified in these submissions has been addressed by the drafters of the Bill. Both issues present systemic problems, and both will continue to plague whistleblowers unless the Government addresses those problems.

IV-B. Recommendations for reform

[178] **First**, in the light of the concerns of three parliamentary committees about immunities from legal action, in part II-E of these submissions, I set out recommendations for reform to the *Ombudsman Act 1976* (Cth).

[179] **Second**, noting:

- a) that the proposed “Whistleblower Ombudsman” is little more than a glorified member of the Commonwealth Ombudsman's staff; and
- b) that the proposed reforms set out in Schedule 1, Part 1 the Bill could just as easily be

⁷⁴ The Legal and Constitutional Affairs Committee's report into the Whistleblower Protection Authority Bill 2025 (No 2) is accessible here:
https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000652/toc_pdf/WhistleblowerProtectionAuthorityBill2025.pdf

effected without any reference to a “Whistleblower Ombudsman”; and

c) by reference to *actual* cases, the demonstrable failures of the Commonwealth Ombudsman or his officials to exercise the powers granted, by statute, in a way that conforms to law, and the expectations of the community and the Parliament,

in part III-B of these submissions, I criticise the lack of independence of the proposed “Whistleblower Ombudsman”, and propose that an independent official, akin to the Inspector of the National Anti-Corruption Commission, be empowered to assess, upon receiving applications, whether the Commonwealth Ombudsman or his staff members are approaching the task of conducting investigations, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in respect of complaints received about inadequacies in investigations conducted under the *Public Interest Disclosure Act 2013* (Cth), in a manner that reflects best practice.

[180] Unlike the proposed “Whistleblower Ombudsman”, who would be subordinate to the Commonwealth Ombudsman, my proposal provides a mechanism for administrative oversight of the merits of decisions made by the Commonwealth Ombudsman, or his officials. My proposal would not be a considerably more expensive exercise than the proposal for a “Whistleblower Ombudsman” and, more importantly, will address the systemic problem that currently exists – namely the inscrutability of decisions of the Commonwealth Ombudsman, or his officials, in respect of complaints made about inadequate whistleblower disclosure investigations under the *Public Interest Disclosure Act 2013* (Cth).

[181] **Third**, in part III-C of these submissions, I set out recommendations for institution of a form of parliamentary oversight in respect of whistleblower activities under relevant laws of the Commonwealth.

Professor Peter Tregear OAM

24 September 2025

Our ref: 2019-402149

21 September 2020

Professor Peter Tregear
By email to: peter.tregear@gmail.com

Dear Professor Tregear

I am writing to let you know that I have finished investigating your complaint about the Australian National University's (ANU) handling of your public interest disclosure (remade PID 2018-300002).

Broadly, your complaint concerned the adequacy of the ANU's investigation of your disclosure. You raised a number of issues, including:

- the investigator's findings were unreasonable on the basis of the information you provided for the purposes of the investigation
- it was unclear from the investigation report how the investigator assessed your documentary evidence and oral evidence at interview
- the investigation report did not address some of the particulars of your allegations
- the investigator appeared to raise doubts about your credibility in the investigation report.

Our role

Our Office's role in assessing a complaint about an agency's handling of a disclosure is to consider whether the agency's actions and decisions were consistent with its obligations under the *Public Interest Disclosure Act 2013* (PID Act) and reasonably open to it. We do not re-investigate the allegations made in the disclosure.

Under the *Ombudsman Act 1976* (Ombudsman Act), we may decide not to continue investigating a complaint where we form the view that further investigation is not warranted in all of the circumstances. A relevant consideration for our Office is whether further investigation of the complaint would be likely to result in a different outcome.

Where we identify flaws in an agency's handling of a disclosure, we may make comments or suggestions to the agency under section 12(4) of the Ombudsman Act. However, we do not have the power to compel an agency to take a particular course of action.

Our investigation of your complaint

The ANU engaged an external investigator to investigate your disclosure and to prepare a report for the ANU's consideration. The investigation report records that the investigator reviewed the material you provided in support of your disclosure, conducted a 'desktop review' of numerous documents and emails provided by the ANU, and conducted interviews with 11 witnesses. The investigation report was accepted and adopted by the ANU. At our request, the ANU provided our Office with an unredacted copy of the report and records of witness interviews.

We subsequently requested additional information from the ANU to enable us to better understand what evidence the investigator considered in reaching particular conclusions, and if the investigator did not consider or give weight to certain material or allegations, why. We followed up on our

request on a number of occasions between April and August 2020. The ANU ultimately did not provide a response.

In the circumstances, we decided to progress our investigation of your complaint based on the information available to us. In doing so, we made some observations to the ANU about its investigation of your disclosure. We invited the ANU to provide a response to our comments, but it did not do so.

Although the investigation appears to have been reasonably comprehensive, based on the information we reviewed, we formed the view that the investigation report did not adequately explain the basis for some of the investigator's findings. As the ANU did not provide us with the additional information we requested, it was difficult for us to be satisfied that the investigator's findings were reasonably open.

We also referred the ANU to the procedural fairness requirements discussed in our Office's Agency Guide to the PID Act. We explained that you had raised concerns about the comments '*he is a liar, a manipulator*' and '*untrainable*' having been included in the investigation report. We observed that it was unclear whether you had been given an opportunity to respond to those comments, to the extent that the investigator intended to rely on them. We suggested that if the investigator had not formed an adverse view of your credibility, or if the comments were not materially relevant to the findings of the investigation, it was unclear why they were included in the report.

The ANU did not respond to our observations.

Conclusion

I have decided to finalise my investigation of your complaint at this point, because I do not think that further investigation would be likely to result in a different outcome for you. Our Office will consider whether it is appropriate to make any further comments or suggestions to the ANU under section 12(4) of the Ombudsman Act with a view to improving future administration of the public interest disclosure scheme. I acknowledge that this may not be the outcome you were seeking, but I do not think that further investigation would be likely to achieve a better result.

The PID Act contemplates that a discloser may make an external disclosure if all of the criteria in section 26 have been met. Our Office cannot comment on whether it is open to you to make an external disclosure in all of the circumstances. We recommend that you seek independent legal advice about the options that may be available to you going forward.

If you think I have overlooked something or there is further information I should consider before finalising my investigation of your complaint, please email me at PID@ombudsman.gov.au. If I do not hear from you by **5 October 2020**, I will proceed to finalise my investigation and close your complaint.

Thank you for bringing your concerns to the attention of the Ombudsman's Office.

Yours sincerely

By email

Cassandra Hodzic
Investigation Officer
Public Interest Disclosure Team